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No. 00-1188

In the Supreme Court of the United States

DEBBIE MITCHELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the federal government's decision regarding the proper allocation of resources between reconstructing a state-designed park road and building an alternate route for commercial traffic was protected by the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 225 F.3d 361. The opinions and orders of the district court (Pet. App. 16-42; App., *infra*, 1a-14a) are unreported.*

JURISDICTION

The judgment of the court of appeals (Pet. App. 14-15) was entered on August 28, 2000. A petition for rehearing was denied on October 25, 2000 (Pet. App. 43-44). The petition for a writ of certiorari was filed on January 22, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

* An earlier memorandum and order of the district court dated June 4, 1998 is appended to this brief and is unreported.

STATEMENT

This is a tort action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, arising out of an automobile accident along Route 209, which runs through the Delaware Water Gap National Recreation Area (Recreation Area), a unit of the National Park System. Petitioner sustained injuries when, to avoid an oncoming car, she drove off Route 209, proceeded for over 300 feet through a grassy clear zone located to the right of the road, crossed back over both lanes of traffic and crashed into a ditch on the opposite side of the road. Pet. App. 4-6.

1. Route 209, the road on which petitioner's accident occurred, was designed, built and maintained by the Commonwealth of Pennsylvania. Pet. App. 4. In 1983, the Commonwealth ceded Route 209 to the United States as part of the Recreation Area. *Ibid.* Since receiving Route 209 from Pennsylvania, the United States' policy has been to convert Route 209 from a commercial through-road to a scenic parkway used only in connection with the Recreation Area itself. *Id.* at 4, 11. In 1983, Congress closed Route 209 to non-local commercial traffic and provided funding for construction of a bypass, which Congress explicitly intended as an alternative to Route 209 for through traffic. *Id.* at 4; Supplemental Appropriations Act, 1983, Pub. L. No. 98-63, Tit. I, 97 Stat. 328-329.

Congress has not appropriated sufficient funds to rebuild Route 209 completely, and, as a result, the Park Service has had to prioritize among work items. Pet. App. 4, 11-12. A 1986 engineering study of the Recreation Area's roads identified numerous bridges requiring reconstruction and the need to repave most roads within ten years. *Id.* at 5, 11. The study also found that

there were obstructions such as culvert head walls within the desired clear zone along the road, including some within one or two feet of the pavement. *Id.* at 11-12. According to a 1992 traffic safety report, the area of Route 209 where petitioners accident occurred was not a high hazard area. *Id.* at 5. In light of these findings, the Park Service prioritized the rebuilding of deteriorating bridges and the elimination of those obstructions that were closest to the road. *Id.* at 12.

2. On July 27, 1993, petitioner was driving a pick-up truck northbound along Route 209 when she saw what appeared to be an oncoming car in her travel lane. Pet. App. 5. To avoid the car, petitioner swerved to the right, exiting the road into a grassy "clear zone" approximately 40-50 feet in width. *Ibid.* Petitioner traveled in excess of 300 feet in this clear zone, *ibid.*, but "made no attempt to stop while traveling across the grassy area." *Id.* at 17. While attempting to reenter the roadway at a speed "no greater than 45 MPH.," plaintiff drove across both lanes of traffic and off the opposite side of the road, crashing into a drainage ditch and culvert head wall located approximately five feet off the road. *Id.* at 5-6.

3. Petitioner brought suit under the FTCA alleging that the Park Service had negligently failed to eliminate dangerous conditions that existed along Route 209. The United States moved for summary judgment on the ground that petitioner's claim fell within the discretionary function exception to the FTCA's waiver of immunity, 28 U.S.C. 2680(a). Specifically, the United States argued that decisions regarding the allocation of funds between reconstruction of Route 209 and construction of a new bypass, and prioritization among safety improvements to Route 209 after receiving it

from Pennsylvania, were exercises of discretion involving policy considerations.

The district court held that the discretionary function exception did not apply. App., *infra*, 12a. The district court agreed with the United States that there was no federal statute, regulation or policy that mandated a particular design or safety features for the Park Service road. *Id.* at 8a-9a. The court nonetheless rejected the government's discretionary function argument because, in the court's view, the Park Service's challenged conduct "did not reflect the exercise of judgment grounded in social, economic or political policy." *Id.* at 12a.

After trial, the district court found that the Park Service was negligent in failing to improve the condition of Route 209 where petitioner's accident occurred and that the Park Service's negligence was a substantial factor in causing petitioner's injuries. The court held that the Park Service should have repaved the shoulder at the point petitioner's truck left the road and should have covered the ditch and culvert head-wall with a "traversable inlet." Pet. App. 40-41. The court rejected the United States' arguments that, as a matter of Pennsylvania law, petitioner's failure even to attempt to slow her vehicle in the grassy area provided as a recovery zone was unforeseeable and constituted the proximate cause of her accident. *Id.* at 19-23.

4. The court of appeals reversed. Pet. App. 1-13. The appeals court first agreed with the district court's conclusion that there was no regulation or other legal requirement that mandated a particular course of conduct by the Park Service with respect to renovating Route 209. *Id.* at 7-8. The court then concluded that the government's decision how to allocate limited funds between the new bypass and reconstruction of Route

209 and among the numerous renovation projects along Route 209 was a decision that involved the weighing of social, economic and political policy. *Id.* at 8, 11-13. The court of appeals rejected petitioner's attempt to focus in isolation on the question whether to repave the shoulder and reconstruct the ditch and culvert at the precise location of petitioner's accident. Rather, the court viewed the decision whether to renovate the particular stretch of road at issue within the context of larger decisions: (1) to reduce the road's usage to recreational traffic by rerouting commercial traffic, and (2) to focus, in light of inadequate funds to rebuild the road completely, on a few high-priority projects instead of a larger number of less costly repairs. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, the petition for a writ of certiorari should be denied.

1. a. The FTCA is a limited waiver of sovereign immunity for certain tort actions against the United States. See 28 U.S.C. 1346(b) (1994 & Supp. V 1998); 28 U.S.C. 2674. A principal limitation on that waiver of immunity is the discretionary function exception, which immunizes the United States from tort liability for discretionary policy choices made by its employees. Under that exception, courts may not hold the United States liable for "[a]ny claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a).

An action is protected by the exception if (1) "it involves an element of judgment or choice," and (2) the judgment "is of the kind that the discretionary function exception was designed to shield." *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988). The first step of the inquiry focuses on whether a "federal statute, regulation, or policy specifically prescribes a course of action" as to the decision at issue. *Ibid.* The second step of the inquiry focuses "on the nature of the actions taken and on whether they are susceptible to policy analysis." *United States* v. *Gaubert*, 499 U.S. 315, 325 (1991); see also *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984) (exception prevents "judicial 'second-guessing'" of decisions "grounded in social, economic, and political policy").

b. The court of appeals' holding that petitioner's claim is barred by the discretionary function exception is correct and wholly consistent with the decisions of the two other circuits that have considered the application of the discretionary function exception to similar facts. See *Cope* v. *Scott*, 45 F.3d 445 (D.C. Cir. 1995); *Baum* v. *United States*, 986 F.2d 716 (4th Cir. 1993). In each case, the court of appeals has held that the discretionary function exception precludes judicial second-guessing of major road renovation projects in our national parks.

In *Cope*, the District of Columbia Circuit held that the Park Service's decision not to repave a particular stretch of the Rock Creek Parkway was protected because the Park Service was required to "balanc[e] factors such as Beach Drive's overall purpose, the allocation of funds among significant project demands, the safety of drivers and other park visitors, and the inconvenience of repairs as compared to the risk of

safety hazards." 45 F.3d at 451. The Park Service had placed the stretch of road in question "in the middle of a priority list of work that needed to be done on eighty different sections of park roads." *Ibid.*

Likewise, in this case, the Third Circuit held that petitioner's suit implicated the balancing of policy considerations such as the "overall purpose" of Route 209 as a recreational park road, rather than a commercial through-road, the "allocation of funds" between repairs to Route 209 and an alternate commercial bypass as well as among significant safety projects, including the reconstruction of deteriorating bridges and removal of those obstacles that posed the greatest danger to park visitors. See Pet. App. 8, 10-12.

In *Baum*, the Fourth Circuit held the Park Service's decision not to replace cast iron guard rails with ones made of cast steel was a protected exercise of the Park Service's discretion. 986 F.2d at 722. The Fourth Circuit rejected the claimant's attempt to limit the court's inquiry to whether the Park Service should have replaced the guard rail at the particular overpass where the petitioner was injured. Rather, the court recognized that replacement of the particular guard rail would have been part of a larger renovation of all the similar guardrails along the highway. *Id.* at 723-724. The Third Circuit similarly held in this case that "[t]he Park Service had to balance the costs of the repairs *of every culvert head-wall along Route 209*," Pet. App. 12 (emphasis added), against other safety concerns, and all of this within the light of "larger policy decisions" regarding the road's proper usage. *Id.* at 11-12.

Rather than reflecting conflict among the courts of appeals, the Third Circuit's decision in this case is entirely consistent with those of other circuits involving similar facts. Because there is no disagreement among

the circuits, there is no reason for this Court to review the Third Circuit's highly fact-bound decision in this case.

2. Petitioner does not squarely challenge the court of appeals' ultimate holding that the discretionary function exception protects the government's challenged conduct. Rather, petitioner asks this Court to decide which party bears the burden of establishing whether a claim falls within the discretionary function exception to the FTCA. That question, however, is not presented by the court of appeals' decision in this case.

As the petition acknowledges, the court of appeals did not address the question in its opinion in this case. Pet. 3-4. Moreover, as petitioner concedes, Pet. 10, the Third Circuit has already adopted the position that petitioner advocates. In *Cestonaro* v. *United States*, 211 F.3d 749 (2000), the Third Circuit held that the government has the burden of proving that the discretionary function exception applies. *Id.* at 756 n.5. There is no indication that the panel in this case disregarded the prior panel's holding on this point.

Petitioner maintains that, sub silentio, the court of appeals must have ignored prior circuit precedent and placed the burden on petitioner because, in petitioner's view, the "panel accorded the government the benefit of every possible favorable inference that could be teased out of the [Park Service supervisor's] superficial affidavit." Pet. 3. Petitioner offers no support for this conclusory assertion. Moreover, even if (contrary to fact) petitioner were correct, a decision that silently deviates from explicit circuit precedent would at most present an intracircuit conflict that is matter for the court of appeals, rather than this Court, to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

In asserting that the court of appeals' decision is unsupported by the evidence, petitioner refers exclusively to the affidavit and attachments that the government submitted in support of its motion as if those materials were the only evidence in the record. See Pet. 3. Petitioner ignores the additional evidence submitted by petitioner herself in opposition to the government's motion (such as the 1986 safety study). Petitioner seems to suggest that the court of appeals was somehow precluded from relying upon that evidence to rule in the government's favor. It is well established, however, that a court must consider all the evidence when ruling on a motion for summary judgment, not just the material submitted by the moving party. See, *e.g.*, *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) (in ruling on summary judgment motion, "the court must review the record taken as a whole" (internal quotation marks omitted)). The evidence, when viewed in its entirety, supports the decision below.

Finally, there is no indication in the court of appeals' decision that the panel viewed the application of the discretionary function doctrine to this case as a close question. As a consequence, the panel had no need to address the allocation of burdens of proof in its opinion because the outcome of the case did not turn upon that question. Because the question on which petitioner seeks certiorari was not material to the panel's resolution of the case, this Court's consideration of that question in this case would be inappropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2001

APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

No. 3:CV-96-0897
(Judge Caputo)

DEBBIE MITCHELL, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: June 4, 1998]

MEMORANDUM

Before the court are the motion to bifurcate trial and the motion for summary judgment of the defendant, United States of America. For the reasons which follow, the motion for summary judgment will be denied and the motion to bifurcate will be denied.

BACKGROUND

Plaintiff, Debbie Mitchell, filed a complaint in the instant action in the United States District Court for the Eastern District of Pennsylvania on March 27, 1996. The basis of plaintiff's claim is injuries which she sustained in a motor vehicle accident on July 27, 1993 while traveling on Route 209 in the Delaware Water Gap National Park. The plaintiff alleges negligence by

the defendant in the design and maintenance of the roadway. The action was brought pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. §2671, *et seq.* On May 6, 1996, the action was transferred to the United States District Court for the Middle District of Pennsylvania.

On August 20, 1996, the United States filed an answer to the complaint raising affirmative defenses. On August 28, 1997, the United States filed a motion to bifurcate trial as to liability and damages issues. On September 15, 1997, the United States filed a motion for summary judgment. The appropriate briefs have been filed by the parties and the motions are ripe for disposition.

DISCUSSION

Summary judgment is appropriate only when there is no genuine issue of material fact to be resolved. Fed. R. Civ. P. 56; *Peterson v. Lehigh Valley Dist. Council*, 676 F.2d. 81, 84 (3d Cir. 1982); *Continental Ins. v. Bodie*, 682 F.2d 436, 438 (3d Cir. 1982). All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. The entire record must be examined in light most favorable to the non-moving party. *Continental Ins., supra.* Additionally, the Supreme Court has ruled that Fed. R. Civ. P. 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986), *cert. denied* 484 U.S. 1066 (1988). The Court further stated that "Rule 56(e) . . . requires the non-

moving party to go beyond the pleadings and by [his] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324.

In support of its motion for summary judgment, the United States argues that the National Park Service's maintenance of Route 209 in the Delaware Water Gap National Recreation Area entailed the exercise of a discretionary function which precludes actions for damages against the United States pursuant to 28 U.S.C. §2680(a). In addition, the United States argues that the National Park Service did not owe plaintiff any duty of care to install a guardrail, when, without fault of the United States, plaintiff's vehicle crossed both lanes of Route 209 and came to rest on a culvert on the opposite side of the road.

In support of its motion for summary judgment, the United States filed the declaration of Mark Spadea, a Civil Engineer with the United States Department of Interior, National Park Service, the Park Road Standards for the National Park Service dated 1984, a map of the Delaware Water Gap area, statutes relating to the Delaware Water Gap, and an excerpt of the deposition of plaintiff describing the circumstances of the accident.[1]

In opposition to the motion for summary judgment, the plaintiff argues that the negligent conduct of the National Park Service was not entitled to protection under the discretionary function doctrine. In addition, plaintiff argues that the failure of the National Park Service to repair the drop-off at the edge of the road-

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[1] *See* Document 25, Exhibits 1-3.

way, to create a traversable inlet or to post a sign was not the type of conduct the FTCA was designed to protect. Rather, says plaintiff, it amounts to nothing more than garden variety negligence, and involves safety considerations under established National Park Service policy. Finally, plaintiff argues that she has set forth a viable claim under Pennsylvania law. In opposition to the motion for summary judgment, the plaintiff has submitted excerpts of plaintiff s deposition regarding how the accident occurred, an Engineer's Report prepared by Lance E. Robson, P.E. addressing the plaintiff's accident and the area in which the accident occurred, excerpts of the deposition of Robert F. Geis, a Design Scoping Report prepared by the Department of Transportation for the Delaware Water Gap National Recreation Area prepared in April 1995, an Engineering Study of the Delaware Water Gap National Recreation Area prepared for the National Park Service by the Federal Highway Administration dated August 15,1986, and a newspaper article from the Philadelphia Inquirer dated October 8, 1997 regarding an outhouse at the Delaware Water Gap.[2]

The discretionary function exception to the FTCA, 28 U.S.C. §2680(a), provides in pertinent part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or *based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty*

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[2] *See* Document 31, Exhibits A-F.

> *the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.* (emphasis added).

The discretionary function has been addressed by the United States Supreme Court in *United States v. Gaubert*, 499 U.S. 315 (1991). In *Gaubert*, the Supreme Court held that the discretionary function exception bars claims predicated upon acts or omissions that involved the exercise of discretion in furtherance of public policy goals. In particular, the Court stated:

> The exception covers only acts that are discretionary in nature, acts that "involv[e] an element of judgment or choice." *Berkovitz, supra*, at 536, 108 S.Ct., at 1958; see also *Dalehite v. United States*, 346 U.S. 15, 34, 73 S. Ct. 956, 967, 97 L.Ed. 1427 (1953); and "it is the nature of the conduct, rather than the status of the actor" that governs whether the exception applies. *Varig Airlines, supra*, at 813, 104 S. Ct., at 2764. The requirement of judgment or choice is not satisfied if a "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," because "the employee has no rightful option but to adhere to the directive." *Berkovitz*, 486 U.S., at 536, 108 S. Ct., at 1958-1959.
>
> Furthermore, even "assuming the challenged conduct involves an element of judgment," it remains to be decided "whether that judgment is of the land that the discretionary function exception was designed to shield." *Ibid.* See *Varig Airlines*, 467 U.S., at 813, 104 S. Ct., at 2764. Because the purpose of the exception is to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy

> through the medium of an action in tort," *id.*, at 814, 104 S. Ct., at 2765, when properly construed, the exception "protects only governmental actions and decisions based on considerations of public policy." *Berkovitz, supra*, at 537, 108 S. Ct., at 1959.

United States v. Gaubert, 499 U.S. 316, 322-23.

The United States Court of Appeals for the Third Circuit recently addressed the discretionary function exception in *Gotha v. United States*, 115 F.3d 176 (3d Cir. 1997). In *Gotha*, the court found that plaintiff's claim that she fell on a footpath leading to a structure under the control of the United States Navy and that the Navy failed to provide routine safeguards on the footpath did not implicate the discretionary function exception to the FTCA.

As the Court pointed out citing to *Berkovitz v. United States*, 486 U.S. 531 (1988), a two-stage inquiry is utilized. First, a court must consider if a federal statute, regulation or policy specifically prescribes a course of action for an employee to follow. If one does, the employee has no rightful option but to adhere to the directive and there can be no lawful discretionary act. However, if circumstances imposing compulsion do not exist, the court must consider whether the challenged action or inaction is of the kind the discretionary function exception was designed to shield, keeping in mind that the discretionary function exception insulates the government from liability if the action involves the permissible exercise of policy judgment. *Gotha v. United States*, 115 F.3d 176, 179 (1997).

We agree with the plaintiff that the situation in *Gotha* is instructive in deciding the instant action. In *Gotha*, the plaintiff's complaint focused on the lack of a

stairway, railing and lighting that made the step path an unsafe means of access to the trailer in the lower lot. In addressing the evidence presented, the court was unable to conclude whether there was an actual decision to forego the measures or whether there was simply inaction. The court held that the action or inaction went more to the issue of negligence rather than whether the issue of policy discretion was implicated. Specifically, the court agreed with the district court that there was no government regulation directing the agency's conduct and that there was no delegation of responsibility to an independent contractor. However, the court found that the district court was incorrect in concluding that policy considerations were present in the Navy's action or inaction. The court disallowed the affidavit presented by the Navy which stated that in evaluating a decision of whether to install an outdoor staircase and artificial lighting there are military, social and economic considerations as being of such general application as to provide no assistance in determining whether the discretionary function exception existed. The court concluded that the challenged actions were not the kind of conduct that can be said to be grounded in the policies applicable to the Navy's mission. Thus, the court held that the discretionary function exception was not applicable to the action.

The first issue which this court must address is whether there is any federal statute, regulation or policy which specifically prescribes a course of conduct for the defendants. The government argues that the Park Service is obligated to promote the preservation of lands in their natural state, not provide the swiftest or safest flow of traffic. Moreover, considerations of the environmental aesthetics compete with safety and eco-

nomics in determining how the Park Service's roads are to be maintained. Therefore, the government argues that the broad policies outlined in 16 U.S.C. §1 would be applicable to the Park Service's treatment of Route 209 in the Delaware, Water Gap Recreation Area, meaning the discretionary function exception applies. In support of its motion, the government attaches the declaration of Mark Spadea[3], Civil Engineer, employed by the U.S. Department of Interior, National Park Service, Northeast Region Philadelphia Support Office. In his declaration, Mr. Spadea states that there are no mandatory rules, regulations or directives which would require the National Park Service to construct guardrails at U.S. Route 209 culvert locations or to reconstruct Route 209 to change the grades of the roadway foreslopes. Mr. Spadea states that:

> 8. The NPS Park Road Standards guideline provides in relevant part that:
>
> > Wherein terrain conditions and park resources permit, backslopes, foreslopes, and roadside drainage channels ***should*** have gentle, well rounded transitions. . . The maximum rate of foreslope depends on terrain conditions and the stability of soils determined by local experience. . .
> >
> > The ditch foreslope used in design ***should*** be related to design speed, type of terrain, soil types, and resource management considerations. Preferably, the ditch foreslope ***should*** be 6:1 for urban parkways and 4:1 for Class I Park Roads. The first 10 feet of the fill slope

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[3] *See* Document 25, Exhibit 1.

> ***should*** also be 4:1 where practical to provide emergency pull off, yet discourage random parking.
>
> Guardrail or guardwalls ***should*** be installed at points of unusual danger such as sharp curves and steep embankments, particularly at those points that are unusual compared with the overall characteristics of the road. The criteria used for warranting guardrail installation on high speed, high volume highways do not apply to the low speed, low volume traffic conditions on most park roads. (emphasis added).

9. The NPS is obligated pursuant to 16 U.S.C. §1 to:

> promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified, . . . as provided by law, by such means and measures as conform to the fundamental purpose of said parks, monuments, and reservations which purpose is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such a manner as will leave them impaired for the enjoyment of future generations.

In addition, Mr. Spadea states that the National Park Service standards for foreslopes and guardrail installation grant significant discretion to park managers to determine appropriate roadway conditions in units of the National Park system and allow park managers to

weigh and consider visitor safety along with aesthetics and budgetary considerations in determining the manner in which park roads are maintained. Park managers have determined that the foreslope grade and the policy of not placing guardrails in front of culverts on U.S. Route 209 are appropriate taking into consideration a variety of factors including visitor safety, visual characteristics, and availability of financial resources. The National Park Service has not installed any guardrails in new locations on U.S. Route 209, except to close off an old entrance to the redesigned Bushkill Boat Access facility.

In opposition to the motion for summary judgment, plaintiff argues that the National Park Service clearly has an established policy of safety considerations relating to highway maintenance. Specifically, plaintiff points to 23 C.F.C. 1230, the American Association of State Highway and Transportation Official publications, Roadside Design Guide, Guide for Selecting, Locating and Designing Barriers, and A Policy on Geometric Design of Highways and Streets as referenced in the Report prepared by plaintiff's expert, Lance E. Robson, P.E.[4] While plaintiff has set forth numerous regulations and policies which she argues apply to the National Park Service, and in particular Route 209, we do not agree that these are mandatory directives which apply to Route 209.

Having determined that there is no federal statute, regulation or policy which specifically prescribes a course of conduct for defendants, we must turn to the second inquiry, that is, whether the challenged action or inaction is the kind that the discretionary function

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[4] *See* Document 31, Exhibit B.

exception was designed to shield, keeping in mind that the discretionary function exception insulates the government from liability if the action involves the permissible exercise of policy judgment.

In the instant action, the plaintiff complains that the National Park Service failed to repair a drop off at the edge of the pavement, to create a traversable inlet at a culvert alongside the road or to post a warning sign, and thus negligently caused plaintiff's injuries. The government argues that the challenged conduct, the design and maintenance of the areas set forth by plaintiff, fall within the agency's policy mission and goals. In support of its argument, the government cites *Baum v. United States*, 986 F.2d 716 (4th Cir. 1993)[5] and *Fahl v. U.S. Dept. Interior*, 792 F. Supp. 80 (D. Ariz. 1992).[6] In particular, the government argues that

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[5] In *Baum v. United States*, the court addressed the issue of negligence of the National Park Service in the design, construction and maintenance of the guardrail system in place on the Fort Meade Road Bridge. After finding no mandatory law governing the design and construction of the parkway guardrails, the court found that the design and construction decisions involving the guardrails was bound up in economic and political policy considerations and was the kind of planning level decisions protected by discretionary function exception. The court also found that the Park Service's judgment involving when and how to maintain its bridges and guardrails is of the type normally involving considerations of economic, social or political policy. The court found that the Park Service's judgment with regard to maintenance also fell within the discretionary function exception.

[6] In *Fahl v. U.S. Dept. of Interior*, the court held that the failure to post warning signs or guardrails on the South Rim of the Grand Canyon was a permissible exercise of judgment by the National Park Service and was grounded in social, economic or political policy. Thus, the discretionary function exception shielded the government from liability.

considerations of the environmental aesthetics compete with safety and economics in determining how the Park Service's roads are to be maintained and that the broad policies outlined in 16 U.S.C. §1 would be applicable to the Park Service's treatment of U.S. Route 209.

Plaintiff asserts the failure of the Park Service to act in the instant situation did not involve the implementation of any kind of regulatory scheme nor the advancement of any considerations typically associated with the management of park lands. Plaintiff submits that the complaints raised by plaintiff could have been resolved by the addition of a couple of yards of asphalt to eliminate the drop off and the creation of a traversable inlet, along with the placement of a low shoulder sign. Plaintiff argues that these inactions or omissions by the National Park Service did not reflect the exercise of judgment grounded in social, economic or political policy. We agree. We do not believe that the Park Service's mission of promoting public use of the national parks while preserving them for the enjoyment of future generations, 16 U.S.C. §1, was exercised in the instant failure to maintain the areas in question along Route 209 or the failure to place a warning sign. *Gotha v. United States*, 115 F.3d 176 (3d Cir. 1997). *See also Ara Leisure Services v. United States*, 831 F.3d 193 (9th Cir. 1987); *Sevler v. United States*, 832 F.2d 120 (9th Cir. 1987); *Summers v. United States*, 905 F.2d 1212 (9th Cir. 1990). Accordingly, we conclude that the discretionary function exception is not applicable in this case.

The next argument raised by the government is that plaintiff is not entitled to relief because the National Park Service did not owe plaintiff any duty of care under the circumstances under the law of the Common-

wealth of Pennsylvania. We believe that under Pennsylvania law, the question of whether or not Route 209, where plaintiff's accident occurred, was in a reasonably safe condition for travel is a factual issue which should be left to the finder of fact. *Fidanza v. Commonwealth, Department of Transportation*, 655 A.2d 1076 (Pa. Commw. 1995). Accordingly, we will deny the government's motion for summary judgment.

MOTION TO BIFURCATE

Defendant filed a motion to bifurcate the trial as to liability and damages. After reviewing the briefs submitted by the parties, we will deny the motion to bifurcate for the reasons stated in the opposition brief plaintiff.

An appropriate Order will follow.

Date: June 3, 1998 /s/ A. R. CAPUTO
A. RICHARD CAPUTO
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

No. 3:CV-96-0897
(Judge Kosik)

DEBBIE MITCHELL, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: June 4, 1998]

ORDER

NOW, this 3rd day of June, 1998, it is hereby ordered:

(1) The defendant's motion for summary judgment [Doc.# 23] is denied;

(2) The defendant's motion to bifurcate trial [Doc.# 18] is denied; and

(3) A non-jury trial will be scheduled forthwith.

/s/ A. R. CAPUTO
A. RICHARD CAPUTO
United States District Judge